Supreme Court, U.S.
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No. 96-936

In The

Supreme Court of the United States

October Term, 1996

CITY OF ANAHEIM,

Petitioner,

vs.

CALIFORNIA CREDIT UNION LEAGUE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner City of Anaheim's levying its transient occupancy tax on federal credit union employees staying in local hotels while on the business of the federal credit union employer violates the provision of tax immunity to federal credit unions under 12 U.S.C. § 1768.

PARTIES TO THE PROCEEDINGS

Petitioner is the City of Anaheim ("Anaheim"). The respondent is the California Credit Union League (the "League").[1]

1. Amici curiae briefs were filed in the court of appeals below. The United States Government filed a brief in support of respondent California Credit Union League's position. The Hawaii Credit Union League joined the League's brief. The National Association of Federal Credit Unions and the Credit Union National Association, Inc., also filed amici briefs in support of the League. The National Institute of Municipal Law Officers filed an amicus brief in support of petitioner City of Anaheim.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
A. Course of Proceedings and Disposition of the Case Below	2
B. Corrections of Misstatements in the Petition	8
Reasons for Denying the Writ	10
I. The Ninth Circuit Decision Holding That The City Is A Routine Application Of The Statute And This Court's Authority.	13
II. There Is No Conflict With The Fourth Circuit Court Justifying This Court Granting Certiorari.	18

Contents

Page

III. It Is Initially For The District Courts, Not This Court, To Adjudicate The Application Of The Ninth Circuit Holding Through Specific Cases And Controversies, As Required By Article III Of The Constitution. 19

Conclusion 21

TABLE OF CITATIONS

Cases Cited:

Aetna Life Inc. Co. v. Haworth, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937) 20

Alabama v. King & Boozer, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3d (1941) 16

Graves v. New York, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939) 17

United States v. County of Fresno, 429 U.S. 452, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977) 16, 17

United States v. Michigan, 851 F.2d 803 (6th Cir. 1988) 12

United States v. Montgomery County, 761 F.2d 998 (4th Cir. 1985) 18, 19

United States v. New Mexico, 455 U.S. 720 (1982) 3, 7, 14, 15, 16

Contents

Page

Statutes Cited:

12 U.S.C. § 1768 ..... *passim*

28 U.S.C. § 1251 1

28 U.S.C. § 1254(1) 1

United States Constitution Cited:

Article III 19, 20

Rules Cited:

Supreme Court Rule 10 ..... 12, 13

Supreme Court Rule 15.1 8

Other Authority Cited:

Comptroller General, 55 Comp. Gen. 1278 (1976) ... 19

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Court of Appeals of the Ninth Circuit Court of Appeals (the "Petition"). The Ninth Circuit decision is reported at 95 F.3d 30 (for the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix A to the Petition). United States District Court for the Central District of California's order denying petitioner City of Anaheim's Motion to Dismiss and granting respondent California Credit Union League's Motion for Summary Judgment is attached to the Petition as Appendix B. The Judgement is attached to the Petition as Appendix C.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 9, 1996. Anaheim did not petition the Ninth Circuit for rehearing. Anaheim timely filed its Petition on December 6, 1996, within 90 days of entry of the court of appeals judgment. Anaheim invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Anaheim appears to seek certiorari in part to have this Court answer practical questions about the legal consequences arising out of the Ninth Circuit decision which were not adjudicated by neither the district court nor the court of appeals. (Petition at 16.) This Court lacks jurisdiction to rule on matters not adjudicated by the courts below. 28 U.S.C. § 1251.

STATUTES INVOLVED

The controlling statute is 12 U.S.C. § 1768, a section of the Federal Credit Union Act. The applicable provision is as follows:

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds,

> and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority, except that any real property and any tangible personal property of such Federal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed. . . .

The statute is set forth in full at Petition Appendix D.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

This case involves the straight-forward application of the broad tax immunity Congress conferred on federal credit unions through 28 U.S.C. § 1768. The facts are simple and undisputed. In November 1993, employees of twenty four federal credit unions attended a conference for credit unions held at the Disneyland Hotel in Anaheim, California. It is undisputed that the credit union employees were on credit union business. The rooms at the hotel had been reserved and paid for by the federal credit unions. The employees presented certification of federal credit union tax exempt status. Nevertheless, these federal credit union employees were assessed a 13% transient occupancy tax pursuant to Anaheim Municipal Code Chapter 2.12. The federal credit unions paid the tax under protest.

On September 1, 1994, Respondent California Credit Union League, in its capacity as a trade association representing the interests of constituent federal credit unions, filed a declaratory relief action against the City of Anaheim in the United States District Court for the Central District of California, *California Credit Union League v. City of Anaheim*, Case No. CV 94-5991

ER (GHx). The lawsuit alleged that by levying its transient occupancy tax on federal credit union employees on federal credit union business, the defendant, City of Anaheim, had violated the tax immunity provision of the Federal Credit Union Act, 12 U.S.C. § 1768. By its complaint, the League sought a declaratory judgment that federal credit unions are not liable for hotel occupancy taxes levied by the City of Anaheim in the limited instance where (1) the hotel rooms triggering the occupancy taxed have been contracted for by the federal credit union and (2) the rooms have been paid for directly by the federal credit unions.

Anaheim filed a motion to dismiss for failure to state a claim upon which relief can be granted. The League opposed Anaheim's motion and also filed a concurrent motion for summary judgment based on undisputed facts. A hearing was held on both Anaheim's motion to dismiss and the League's motion for summary judgment. Both parties stipulated that disposition by summary judgment was appropriate. At the district court proceedings, Anaheim conceded that federal credit unions are instrumentalities of the federal government. (*See* Petitioner Appendix A at 3 n.1.)

At the hearing, the district court, the Honorable Edward Rafeedie presiding, announced its tentative ruling to deny Anaheim's motion to dismiss and grant the League's motion for summary judgment. The court's analysis was straight-forward: employees of federal credit unions on credit union business stand in the shoes of their federal credit union employers (under *United States v. New Mexico*, 455 U.S. 720 (1982)) and therefore the levy of an occupancy tax on those employees violated 12 U.S.C. § 1768. At the hearing, Anaheim's primary objection to the court's tentative ruling was practical, not legal. (Petition Appendix F at 5-6.) Upon announcing its tentative ruling, the court heard the City's argument:

Do you wish to be heard for the City?

MR. JOHNSON: Yes, your Honor.

I think one of the things that needs to be addressed if the court is going to grant the motion for summary judgment, is what proof is the hotel going to need to know that this employee is on Federal Credit Union business? Some of the exhibits attached to the complaint were a little contradictory.

THE COURT: That isn't what you have said in your papers. In your papers you said that the entity itself is exempt, not the employee. Now you are trying to change your position here a little bit.

MR. JOHNSON: **What I'm concerned about, your Honor, is implementation of the court's ruling**. How is the hotel going to know when they are looking at a person whether they are there on credit union's business or they are there on personal business?

THE COURT: They have the right to demand proof.

MR. JOHNSON: Okay. . . .

Reporter's Transcript, Petition Appendix F at 5 (emphasis added). Hearing nothing from Anaheim which changed the court's analysis, the court adopted its tentative as its ruling and judgment was entered in favor of the League. (Petition Appendix C.)

Anaheim appealed the judgment to the Ninth Circuit Court of Appeals arguing that the incidence of the tax fell on the employee, not the federal credit union and therefore the tax did not violate 12 U.S.C. § 1768. The appeal was fully briefed by both parties and also by *amici curiae* for both parties. The United States Government filed a brief in support of the League's position. The Assistant Attorney General's statement of the interest of the United States here is noteworthy:

INTEREST OF THE UNITED STATES

> 1. Federal credit unions are instrumentalities of the United States engaged in the performance of important governmental functions. [citation omitted]
> . . . .
>
> In 12 U.S.C. § 1768, Congress has given federal credit unions an affirmative statutory grant of immunity from state and local taxation coextensive with the immunity granted federal instrumentalities under the Constitution and then waived that immunity with respect to "any real property and any tangible personal property . . . to the same extent as other similar property is taxed" by a state or locality. Thus, when a state or local government imposes a tax that is not permitted by 12 U.S.C. § 1768, as the City of Anaheim, California (the City) has done in the case at bar, the tax immunity of a federal instrumentality is violated. ***It is the Federal Government's interest that the tax immunity of its instrumentalities not be violated.***

2. If this Court were to accept the City's position with respect to the tax involved, it could have significant consequences for instrumentalities of the United States other than federal credit unions and for the United States Government itself. The City contends (Br. 11, 20) that it can levy a "transient occupancy tax" where a federal credit union employee is staying at a hotel room contracted for and paid for by a federal credit union while the employee is traveling to conduct official business on the basis that the tax is imposed on the employee. As previously noted, the City does not dispute that a federal credit union is an instrumentality of the United States (CR 9 at 2), nor does it base its authority to levy this tax on an exemption provided in a federal statute. Rather, under the City's position, any state or local taxing authority would be able to impose taxes on rents attributable to hotel rooms contracted for and paid for by the Federal Government that were occupied by federal employees away from home on Government business so long as it characterizes its tax as being a privilege tax imposed on transients. Moreover, as the City points out (Br. 17) "[t]he issue to be resolved here concerns the scope and effect of the Federal and state constitutional immunity from local taxation recognized over the years by courts." Accordingly, the decision reached in this case may well have Government-wide ramifications.

Brief for the United States as Amicus Curiae on behalf of the Appellee, 2-4 (internal footnotes omitted, emphasis added).[2]

The Hawaii Credit Union League joined the League's brief. The National Association of Federal Credit Unions and the Credit Union National Association, Inc., amici also filed briefs in support of the League. The National Institute of Municipal Law Officers filed an amicus brief in support of petitioner City of Anaheim.

The Ninth Circuit affirmed the summary judgment. The Ninth Circuit's decision provides a straight-forward, step-by-step analysis supporting its holding. Beginning with the express terms of 12 U.S.C. § 1768, the court notes the broad tax immunity the Congress conferred on federal credit unions. Petition Appendix A at 2-3. The court then cites to this Court's ruling (in *United States v. New Mexico*, 455 U.S. 720 (1982)) that in order to enjoy the benefit of federal tax immunity a private taxpayer must stand in the shoes of the government. Petition Appendix A at 4-5. The court then reasons that: "The Court's analysis in *New Mexico* compels the conclusion that federal employees are constituent parts of the United States, at least with respect to their professional duties. *See id.* When acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete."

From this analysis, the court then concludes:

> Because the federal credit unions' employees were attending to credit union business while

2. Although the parties briefed the constitutional tax immunity issue for the Ninth Circuit, the court (appropriately) declined reaching any Constitutional issue since it fully disposed of the matter solely on the basis of Section 1768.

> staying at the Disneyland Hotel in Anaheim, they were "constituent parts" of the credit union and immune from Anaheim's transient occupancy tax under Section 1768.

Petition Appendix A at 5. Anaheim did not seek rehearing or clarification from the court of appeals.

B. Corrections of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.1, respondent brings the following misstatements contained in the petition to the Court's attention.

Petitioner Anaheim misstates the scope of the Ninth Circuit's decision as going to constitutionality[3], as opposed to statutory construction. It is, however, unambiguous on the face of the Ninth Circuit's decision that the decision is based on statute (12 U.S.C. §1768), *not* the Constitution. Indeed, the Ninth Circuit specifically says so:

> Independent of the protection afforded by Section 1768, courts have generally considered federal credit unions to be instrumentalities of the federal government and thus immune from state taxation under the supremacy clause. [Citations omitted.] Relying on our decision in *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1132

3. Anaheim states: "Whether, under 12 U.S.C. § 1768, the City of Anaheim can constitutionally levy its transient occupancy tax upon employees of federal credit unions when the employee occupies a hotel or motel room on credit union business. . . ." Petition at i. And again: "The issue here is whether the City of Anaheim can *constitutionally* impose its TOT [transient occupancy] tax upon employees of federal credit unions when the employee is on credit union business. . . ." (Petition at 2.)

> (9th Cir. 1994), the National Institute of Municipal Officers ("cities") argues, in an amicus brief, that federal credit unions are not instrumentalities of the United States. [Footnote omitted.] *Because courts have considered the immunity afforded by Section 1768 to be coterminous with that afforded by the supremacy clause, we do not address the cities' argument.* [Citations omitted.] If credit unions would be immune from local taxation were they to be considered an instrument of the federal government, then *regardless of the instrumentality question they are immune from local taxation under Section 1768. See Michigan,* 801 F.2d at 807.

(Petition Appendix A at 3, emphasis added.)

Anaheim also misstates the Ninth Circuit's holding: "The Ninth Circuit holds, in effect, that employees of federal instrumentalities are federal instrumentalities themselves." To the contrary, in its decision, the Ninth Circuit merely held that *when doing the business of the government,* government employees stand in the place of the government:

> The Court's analysis in [*United States v.*] *New Mexico* [, 455 U.S. 720, 738 (1982)] compels the conclusion that federal employees are constituent parts of the United States, *at least with respect to their professional duties. See id. When acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete.*

(Petition Appendix A at 5, emphasis added.)

Anaheim also misstates the scope of issues adjudicated at the district court and court of appeals levels. Anaheim states:

> The issue of whether the court has to make a distinction if the employee pays for the hotel room with a private check was raised below. Further, another issue raised was if an employee brings his or her spouse, does the spouse pay a TOT [transient occupancy tax] tax?

(Petition at 16.) As the district court's order (Petition Appendix B) and judgment (Petition Appendix C) and the court of appeals' decision (Petition Appendix A) demonstrate, these issues manifestly were not adjudicated below. The were "raised" only in the sense of colloquy during the district court's hearing, *not* by the pleadings. (Petition Appendix F.) They are not ripe for review by this Court as suggested by Anaheim.

REASONS FOR DENYING THE WRIT

This case is about a municipality so desperate for revenues in an era of shrinking public funds that it seeks to circumvent plain statutory tax immunity for federal credit unions by tortured semantics. By its instant petition, Anaheim refuses to heed the sound analysis and unambiguous decisions issued by both the district court and court of appeals which flatly rejected its strained argument. Instead, money is *the* issue.[4] Indeed, it is

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4. This could not be more clear. Anaheim proclaims:

> The practical effect of the Ninth Circuit's opinion is to permit all federal credit union and federal employees to stay in hotels in any city without paying a TOT [transient occupancy tax] while they are on business. It is estimated that a total of approximately $100,000

(Cont'd)

surprising how forthright Anaheim is. Anaheim admits that it values collecting revenue over complying with Section 1768:

> If the hotel (serving as the statutory tax-collector) hands over the correct sum due the City of Anaheim, the City is not going to object to the hotel's accepting payment from the federal credit union employer.

(Petition at 12.)

Anaheim concedes — as it must — that under Section 1768 it cannot tax a federal credit union. Not able to tax federal credit unions directly, it then tries to make an end run around the plain language of Section 1768. Anaheim argues that it is the *employee* of the federal credit union, not the federal credit union, who is taxed. Anaheim argues that because it is the employee and not the federal credit union who sleeps in the hotel, the occupancy tax does not violate Section 1768. This argument is remarkable. Of course a federal credit union (like a corporation or any other nonnatural person) can act *only* through its employees and agents. Thus, the district court and Ninth Circuit in this case (and this Court in other cases) were absolutely correct in holding that when doing the government's business, the government employee stands in the government's shoes. How could it be otherwise?

To accept Anaheim's strained logic would mean that any

(Cont'd)

> will be lost annually to the City of Anaheim in TOT tax revenue if the Ninth Circuit decision stands.

(Petition at 6.) However, Anaheim is mistaken; it is not the Ninth Circuit decision which circumscribes its ability to tax federal credit unions, but rather Congress in enacting 12 U.S.C. § 1768.

taxing authority could get around the Section 1768 tax immunity by simply wording the tax ordinance[5] or statute such that it was the employee, rather than on the federal credit union, that was taxed. No. This plainly is not what Congress intended. When Congress enacted Section 1768: it intended for federal credit unions to be free from taxation, both legally and practically. The Ninth Circuit Court of Appeal's affirmance of the district court's award of summary judgment is therefore a straightforward application of the statute, is not in conflict with this Court's authority or that of any other Circuit and does not require review by this court.[6]

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5. Anaheim argues that the Ninth Circuit's decision here "is contrary to the plain language of the Anaheim Municipal Code." Anaheim does not get it. The United States Congress has legislated that cities, states and other local taxing authorities *cannot* tax federal credit unions. It is therefore patently beside the point whether the Ninth Circuit's decision "is contrary to" the City's ordinance. What matters is that application of the ordinance to the federal credit union violates federal statute. *See United States v. State of Michigan*, 851 F.2d 803, 807 (6th Cir. 1988).

6. Rule 10 of the Supreme Court Rules sets forth this Court's guidelines for deciding petitions for writs of certiorari. In pertinent part, Rule 10 provides: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, Rules of the Supreme Court. In addition to this general statement, Rule 10 also sets forth criteria which "indicate the character of the reasons the court considers:"

> (a) A United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this court's supervisory power; . . .

(Cont'd)

I.

THE NINTH CIRCUIT DECISION HOLDING THAT THE CITY IS A ROUTINE APPLICATION OF THE STATUTE AND THIS COURT'S AUTHORITY.

In its decision, the Ninth Circuit merely and routinely interpreted the scope of the tax immunity conferred on federal credit unions by the Congress under 12 U.S.C. § 1768. *See generally* Petition Appendix A. Although Anaheim tries to add a Constitutional dimension to the Ninth Circuit decision, it simply is not there. *See* discussion at Misstatements section *infra*. The circuit court's analysis is a well reasoned interpretation of Section 1768 which accurately applies principles and precedents established by this Court. There is *no* need, much less a compelling need, for review by this Court.

As part of the Federal Credit Union Act, Congress enacted 12 U.S.C. § 1768. And, as the Ninth Circuit states in its decision,

> 12 U.S.C. § 1768 confers upon federal credit unions broad immunity from federal, state, and local taxation:
>
> The [f]ederal credit unions organized

(Cont'd)

> (c) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

Rule 10. Anaheim, in its Petition, patently fails to establish *any* of these criteria demonstrating a "*compelling*" need for this Court's review.

> hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority, except that any real property and any tangible personal property of such [f]ederal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed.

(Petition Appendix A at 2-3.) The statute is thus express and unambiguous that federal credit unions are immune from *all* taxation "except that any real property and any tangible personal property of such Federal credit unions shall be subject to . . taxation to the same extent as other similar property is taxed." Accordingly, Anaheim does not — cannot — dispute that federal credit unions are exempt from its transient occupancy tax. But in its apparent desperation to collect the expected $100,000 per year (Petition at 6), Anaheim constructs a legal fiction — nay, a semantic fiction — that if it taxes the *employees* of the federal credit union while they are conducting the credit union's business, it (Anaheim) has somehow jumped outside the reach of Section 1768 immunity. But such semantic gymnastics cannot frustrate the intent of Congress to immunize federal credit unions from local transient occupancy taxes. And so held the Ninth Circuit.

The Ninth Circuit correctly applied this Court's decision in *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982). (Petition Appendix A at 4.) In *New Mexico*, this Court considered the propriety of taxing contractors which provided research and other services involving nuclear energy

to the federal government. There the Court specifically discussed the distinction between the government's employees and agents, on the one hand, and independent contractors with the government, on the other. *Id.* at 739-740. And the basis of that distinction was precisely that when a government employee is doing the government's business, there is an identity of interests between the government and the employee; no separation exists. *Id.* However, with an independent contractor, even when the contractor is doing services for the government, the interests never merge and the contractor is *always* separate and distinct from the government. *Id.* As the Court explained: "[T]he contractors remained district entities pursuing 'private ends,' and their actions remained 'commercial activities carried on for profit.' " *Id.* at 739. This Court's distinction between the identity of interests between an employee and the federal employer on the one hand, and the separation of interests between a federal agency and its independent contractor on the other, is unambiguous:

> **In contrast to federal employees,** then, Sandia and its fellow contractors cannot be termed "constituent parts" of the Federal Government. It is true, of course, that employees are a special type of agent, and like the contractors here employees are paid for their services. But **the differences between an employee and one of these contractors are crucial.** The congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes. Allowing the States to apply use taxes to such entities does not offend the notion of federal supremacy.

Id. at 740-41 (emphasis added). *Accord Alabama v. King & Boozer*, 314 U.S. 1, 11, 62 S. Ct. 43, 86 L. Ed. 3d (1941) (holding tax was permissible because it fell upon a contractor, rather than a government agent or employee).

The Ninth Circuit's analysis and application of *New Mexico* in its decision here is straight-forward:

> In *New Mexico*, the Supreme Court, noting "the confusing nature of our precedents," concluded that the essence of the federal government's tax immunity is a prohibition against states assessing taxes "directly upon the United States." 455 U.S. at 733. Immunity from state or local taxation is only appropriate "when the levy falls on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.* at 735. To avoid paying state or local taxes, "a private taxpayer must actually stand in the Government's shoes." *Id.* at 736 (internal citations omitted). *See also United States v. County of San Diego*, 965 F.2d 691, 697 (9th Cir. 1992) (quoting *New Mexico*).

(Petition Appendix A at 4.) Thus the Ninth Circuit's analysis and use of this Court's precedent is proper and does not invite, much less require, this Court's review.

Anaheim's reliance on *United States v. County of Fresno*, 429 U.S. 452, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977), also fails to establish that the Ninth Circuit's decision is appropriate for

review by this Court. In *Fresno*, this Court upheld a state property tax levied against forest rangers for their *personal* possessory interest in their homes, which were located on federal property, even when the government reimbursed the employees for the tax. *Fresno* is inapplicable here because the nature of the interest taxed is fundamentally different. In *Fresno*, the Court approved the tax on the government employee because the tax was of a personal nature, as opposed to an employee carrying out an official government function. *Id.* at 466. The personal nature of the interest was even admitted in the government's complaint:

> The government's complaint in this case alleges that the occupancy of the Forest Service houses constitutes part of appellant's "compensation" for services performed — thus, conceding that the occupancy is of *personal benefit* to the employee . . . the Forest Service itself purports to measure the personal benefit of the occupancy to the employee and collects rent in such amount through deductions from the employees paycheck. Since virtually everyone in this country pays for housing for himself or herself and family, common sense compels the conclusion that the occupancy of the house provided by an employer for the employee's family is a *personal financial benefit* to the employee.

Id. (Emphasis added.)

It is well-established that income, or compensation, of government employees is taxable. *See Graves v. New York*, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939). Accordingly, contrary to Anaheim's argument, *Fresno* in no way shows that

the Ninth Circuit decision here in any way extends or goes contrary to this Court's precedents. The Petition should be denied.

II.

THERE IS NO CONFLICT WITH THE FOURTH CIRCUIT COURT JUSTIFYING THIS COURT GRANTING CERTIORARI.

Anaheim argues that the Ninth Circuit decision conflicts with the Fourth Circuit opinion in *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985). This is just plain wrong. In *Montgomery County*, the Fourth Circuit held that Montgomery County could constitutionally[7] impose a transient occupancy tax on *outpatients* of the National Institute of Health (the "NIH"). *Id.* at 1002. This has nothing to do with whether **employees** of a federal credit union doing credit union business can be lawfully taxed.[8] The decision in *Montgomery County* does not even discuss *employees* of the NIH, much less render a holding concerning employees of a federal instrumentality. And Anaheim admits as much. Consider its characterization of the Fourth Circuit's holding:

> that a county tax on transients renting hotel

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7. Plainly the Ninth Circuit decision cannot conflict with the Fourth Circuit's decision in *Montgomery County*; the Ninth Circuit interpreted a statute, the Fourth Circuit the United States Constitution.

8. Anaheim chastises the Ninth Circuit for not discussing *Montgomery County* (Petition at 6) and accuses its decision of being "a mutation" of the Fourth Circuit decision (Petition at 7). This is curious. The reason the Ninth Circuit did not discuss *Montgomery County* is plain; it is inapplicable to the analysis. The Ninth Circuit decision is not a "mutation" of *Montgomery County*; it is a wholly different animal.

> sleeping accommodations fell on the occupants of the sleeping accommodations [*who were outpatients at the National Institutes Of Health ("NIH")*] . . . .

(Petition at 10, emphasis added.) But the Ninth Circuit decision does *not* involve guests of a federal instrumentality, it involves employees. The analogous situation to *Montgomery County* would be if the League were seeking tax exempt status for *nonemployee* guest speakers at the credit union conference. Thus, the Ninth Circuit's holding that federal credit unions can occupy rooms as transients through their employees is therefore entirely consistent with the Fourth Circuit's decision in *Montgomery*. There is no conflict justifying, much less compelling, review by this Court.[9] The Petition should be denied.

III.

IT IS INITIALLY FOR THE DISTRICT COURTS, NOT THIS COURT, TO ADJUDICATE THE APPLICATION OF THE NINTH CIRCUIT HOLDING THROUGH SPECIFIC CASES AND CONTROVERSIES, AS REQUIRED BY ARTICLE III OF THE CONSTITUTION.

In a fundamental misapprehension of the federal court system, Anaheim argues that this Court should grant certiorari because otherwise "cities all over the country will face

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9. Anaheim admits that the Ninth Circuit's decision is in accord with the position of the Comptroller General, 55 Comp. Gen. 1278, 1280-81 (1976). (Petition at 13-14.) Anaheim then tries to distinguish this Opinion depending (again) on the tautological argument that because the federal credit union itself did not sleep in the room, it was the employee personally who was taxed, not the credit union. Again, Anaheim's position would completely eviscerate Section 1768.

uncertainty in the application of their TOT taxes." Anaheim raises various questions it has concerning the practical effects of the Ninth Circuit's ruling.

> The issue of whether the court has to make a distinction if the employee pays for the hotel room with a private check was raised below. Further, another issue raised was if an employee brings his or her spouse, does the spouse pay a TOT [transient occupancy tax] tax? The Ninth Circuit opinion does not directly answer these issues.

(Petition at 16.)

In the first place, the Opinion does answer the questions. The rule is: Federal credit union employees on credit union business are entitled to the tax exemption of 12 U.S.C. § 1768. It's that simple.

But more fundamentally, if Anaheim has lingering questions about the legal consequences of the Ninth Circuit decision, it has the options of seeking an advisory opinion of an appropriate administrative agency or instituting a declaratory relief action in *district* court. However, it is utterly plain that the court of appeals (and most certainly this Court) are not authorized by Article III of the Constitution to idly ruminate on all the ins and outs of a particular court decision.[10] Rather, over a dispute such as this, this Court has *review* jurisdiction only, *not* original

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10. Indeed, without an active, actual dispute between parties there is no justiciable "case or controversy" as required by Article III. The dispute "must be a real and substantial controversy admitting of specific decree of a conclusive character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Inc. Co. v. Haworth*, 300 U.S. 227, 294, 57 S. Ct. 461, 464, 81 L. Ed. 617 (1937).

jurisdiction (on this record) to rule on the particular, collateral questions Anaheim raises. Accordingly, these lingering questions not only do not — they cannot — justify granting certiorari. The Petition should be denied.

CONCLUSION

The Ninth Circuit's affirmance of the district court's award of summary judgment here is a routine application of the unambiguous provisions of 12 U.S.C. § 1768. The decision raises no conflict with the Fourth (or any other) Circuit. And while the League agrees with Anaheim that the Ninth Circuit addresses an important taxation issue, the Ninth Circuit's decision soundly resolves the issue with a clear, well reasoned analysis consistent with Congressional intent and existing authority. In short, there is *no* reason for this Court to review the decision. The Petition should be denied.

Respectfully submitted,

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